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SUPREME COURT

No. 716

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY
INSURANCE COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Instead of arguing the four questions argued by the Petition for Certiorari, respondent denies such questions are raised by the record, and then sets up what it claims are the only two issues raised by the record, the first of which, however, bears out that a factual question was taken away from the jury and actually is respondent's own inverted self-deciding variation of Petitioner's Question 5, which was stated but not argued in the Petition for Certiorari; and the second of which relies partly on assertions not supported by the record and is not the basis of any ruling of either of the court below.

As to the respondent's claim that it was not served a copy of the record filed in this Court, the Rules of this Court state (Rule 21, paragraph 1) that the petitioner is not required to serve on the respondent a copy of the record to be filed in this Court on a Petition for Certiorari (presumably because the respondent already has such a record from his participation in the proceedings in the Court of Appeals), but only that the respondent be notified on the form supplied by the Clerk of the contents of the record filed in this Court (Rule 21, paragraph 2). This was done. As to respondent's allegation that petitioner's record references do not support statements for which they are given, respondent fails to give a single example to bear out such a contention.

RESPONDENT'S QUESTION 1

The claimed factual statement made by respondent to support its first question shows only what petitioner has itself always insisted, i.e., that as between petitioner and respondent there was a sharp disagreement as to the weight and credibility that should be accorded to petitioner's records and "inventory shortage" evidence. It was up to the jury, however, to make the necessary resolutions of credibility and determinations of the weight of the evidence. This the jury was not permitted to do.

Reply to Respondent's Contentions on the Facts Point By Point.

1, 2, 3 and 4. Respondent claims six possible causes, including theft, for the "unexplained" loss experienced. These were theoretical possibilities only, but on the evidence, all of these possibilities except theft were eliminated:

a. It was mathematically demonstrated that any possible errors in weekly inventories cancelled each

other out; that instead of taking the algebraic sum of the "shrinks and gains" from the weekly product analysis sheets, as was done for convenience, they could have been ignored entirely, and instead, exactly the same results would have been obtained by adding to the opening inventory for the entire period the purchases and the sum of all the charge-ins and then subtracting from that total the sum of all the charge-outs, the sales and the closing inventory for the period.[1] Even any possible errors in the opening and closing inventories for the entire period would have had only a negligible effect on the results, because they would have had to be so small compared to the tremendous flow of millions of pounds of product through the plant over the entire periods.[2]

(b) Possible errors on transfers were likewise negligible. Round numbers used, as was customary in the industry, produced no practical error, because they were very close to mathematical accuracy in the first place, and because of the large numbers of transactions involved, on actuarial principles any slight "overs" would balance out similar "unders", leaving no net resulting error.[3]

(c) Spoilage could not have produced error, because spoiled products were not discarded, but transferred to lard if still so usable, or to tankage, and in either case such transfers were recorded and credited.[4]

(d) There was no evidence of any uncorrected mistakes. Respondent's reference to an excerpt of testimony at 26b-27b failed to include the immediately

[1] 59a, 60a, 63a, 64a-66a, 73a-75a, 86a, 96a-97a, 100a-101a, 120a, 122a-123a, 8c, 19c.
[2] 73a-75a, 76a-77a, 86a-87a, 8c.
[3] 27a, 62a-63a, 66a, 99a, 111a, 124a-125a, 139a-140a, 143a.
[4] 27a-28a, 70a, 92a, 25c, 29c-30c.

following testimony which appears at [illegible] and shows that the alleged mistake was one that had been corrected. Respondent's own auditor who had spent weeks going over the petitioner's records, could not find a single mistake.[5] Petitioner's auditor was likewise satisfied with the accuracy of the records.[6]

(c) Petitioner allowed more than adequate factors for natural shrink.[7] Respondent's own auditor conceded that in its claim petitioner had allowed for the sum of the two periods of the claim almost a million pounds for natural shrink of fresh pork[8] and almost two hundred thousand pounds for natural shrink of sausage alone.[9]

(d) This left theft as the only reasonable actual cause of the six original theoretically possible causes which respondent claims could have been responsible for the unexplained loss.[10]

5 Shrink tests were in fact made at petitioner's plant.[11]

6 An auditor's inventory at the close of a fiscal year was produced, to wit: the opening inventory of the week ending November 5, 1949.[12]

7 It was never contended that all stealing stopped when Harris and his confederates were caught.[13] Certainly petitioner still keeps records of shrinks and gains as part of good accounting and product disposition control.

8 While petitioner could not find a record of the exact amount of meat given to the employees' cafeteria for the period of the claim, a generous allowance was

5 177a-178a
6 19c-20c
7 29a, 32a, 53a, 54a, 55a, 57a-58a, 103, 104, 136a, 147a-148a; Ex. 231a; Ex. 21, 241a; Ex. 25, 247
8 172a-173a
9 175a
10 30a, 51a, 68b-69b, 78b-84, 113a-114a, 117a
11 29a, 52a, 54a, 22c, 23c
12 8c-9c, 12c-13c; Ex. 4, [illegible]
13 94a-95a

made in the claim for this item, based on the number of employees involved and subsequent records of actual meats so consumed.[14]

9 Of course petitioner cannot say how much any particular person stole, as a ring of thieves and other employees unidentified were responsible for the thefts. Petitioner claimed only the total attributable to all these causes together and not to any individual thief alone.

10 There is no evidence whatever, and respondent cites none, to the effect that no credit was allowed for the weight of gambrels. In fact, although the question was not raised at the trial by respondent, or anyone else, scales were adjusted to eliminate the gambrel weights when the "hot weight" was recorded.

11 Naturally there were no reports of anyone's stealing prior to Harris' apprehension, because before that time how the large scale thefts were being accomplished and by whom was not known. However, before that time there were some instances of dishonesty discovered.[15]

12 While it is true that temperature, refrigeration, air circulation, humidity, source and feeding have a very slight effect on the amount of natural shrink, those factors were favorably controlled at petitioner's plant and were included in the percentage allowed by petitioner for natural shrink.[16]

13 It was only Harris' permanent employment that began on July 26, 1950. He was previously employed fairly regularly as a spot laborer.[17]

14 There is no evidence on the record that Jackson made a written statement to anyone. Petitioner at no time refused to produce any written statements from anyone which it had in its possession. The record reference cited

[14] 99a
[15] 41a, 42a, 61a, 130a, 131a
[16] 11c, 25a, 28a-31c
[17] 17a, 101a-102a, 141a, 215a-216a

by respondent, i.e., 17b; was a request by respondent for written statements, including one supposedly made by Jackson as to the existence of which there was no evidence, which request was made after the case was closed and the trial court had already instructed the jury before argument. It was obviously a brazen theatrical gesture for the jury's benefit, and was promptly overruled by the trial judge within seconds—even waiting to hear from petitioner's counsel.[18]

15. Sales of whole dressed hog shipments were included in petitioner's computations and resulted in a much larger normal shrinkage allowance than respondent was entitled to, because even though such hogs were not subject to cutting shrinks or sales cooler shrinks, petitioner allowed the same full percentage of natural shrink on the whole hog shipment weight as on the cut up fresh pork.[19] Petitioner did in fact produce invoices for approximately six million pounds of dressed hog shipments, but respondent refused them, and likewise did not accept petitioner's offer to permit respondent's accountant to examine them and all other invoices of petitioner.[20]

As to bone removed from hotel cuts, that would have been handled by petitioner's separate fabricating department.[21] Petitioner's accounting department, not the witnesses referred to by respondents, had such records. Moreover, the amount of such bone was irrelevant because under petitioner's accounting system it would already have been credited to fresh pork when the meat which included such bone was cut from the whole dressed hog and sent to the fabricating department. Furthermore, even then there would have been a record of the weight of the bones

18 210a.
19 51a, 54a, 58b, 93a, 171a; Ex. 9, 231a; Ex. 21, 241a; Ex. 22, 242a, 58b, 30, 40.
20 32a.
21 166a-171a.
21a 23a-24a.

themselves because they would have been weighed on transfer to tankage.[22]

16. Respondent cites no record reference to the claim of spoilage and as is shown above (page 3, subparagraph (c)) spoilage could not have been a factor.

17. Understandably, respondent cites no record reference for this numbered contention, because no one knows what Jackson did or did not observe, since he refused to testify as to any of his activities, under protection of the Fifth Amendment.

The foregoing replication to respondent's factual contentions point by point as to what the evidence did or did not prove, delineates the sharp difference of opinion between petitioner and respondent on the weight and credibility of the evidence and the witnesses with respect to the subject of petitioner's records and "inventory shortage". As shown above, petitioner's witnesses stoutly maintained that the records were accurate, reliable, and showed conclusively the disposition of all product in the honest course of business and the disappearance of product the only explanation for which was dishonesty. Respondent claimed to the contrary. It was, therefore, for the jury and not either the trial or appellate court to determine weight or to resolve credibility.

As we should like to confine ourselves in this Reply Brief to the issues argued in the Petition for Certiorari we do not wish to take much space at this time (but will develop the point more fully on the merits if the Petition is allowed) to show the lack of justification for the trial court's exclusion of, and the Court of Appeals' disparaging unfavorable comments to, petitioner's evidence, which were the main subject of respondent's brief. Suffice it to say, analogous evidence no stronger than as strong was held a proper basis for recovery in actions on similar insurance policies

[22] 4.

in *New Amsterdam Casualty Company* v. *W. D. Felder & Co.*, 214 F. 2d 825 (C.A. 5, 1954) and *Morrow Retail Stores, Inc.* v. *Hartford Accident and Indemnity Co.*, 111 F. Supp. 772 (D.C. Idaho, 1953).

Moreover, since the fact that petitioner had been damaged to some extent was definitely established by the direct evidence of theft, the proof of the amount of such damage (the "inventory shortage" evidence offered to corroborate this direct evidence) did not have to be certain. *Anderson* v. *Mt. Clemens Pottery Company*, 328 U.S., 680 (688), 66 S. Ct. 1187, 90 L. ed. 1515 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S. Ct. 248, 75 L. ed. 544 (1931); *Palmer* v. *Conn. Railway and Light Co.*, 311 U.S. 544, 559, 61 S. Ct. 379, 85 L. ed. 336 (1941); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406-408, 60 S. Ct. 681, 84 L. ed. 825, 834, 835 (1940); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. ed. 652 (1946).

Speculation or unwarranted inferences could arise only if one refuses to believe petitioner's witnesses and accepts respondent's argument. Evidence is speculative or requires inferences not allowed in law, if the evidence adduced permits equally probable conflicting inferences to be drawn therefrom, and there is no evidence which would justify a choice of one inference over another. That is the principle for which the cases cited by respondent on page 7 of its brief stand. However, in the case at bar, there is direct evidence of theft and a conflict as to the reliability of the records and evidence, offered in corroboration of the direct evidence to help show the amount of the loss. If petitioner's witnesses were to be believed, such records were accurate and reliable. Respondent claimed otherwise. It was for the jury to decide what weight should be given that evidence and whom it wished to believe. Here there was not simply evidence from which

several conflicting inferences of equal probability were possible with no other evidence which would justify the jury in selecting one inference rather than another. Here there was just such evidence, if the jury chose to believe it, and it was solely the jury's prerogative to make the choice. That evidence would have logically required the jury to select the one inference, to-wit, theft by employees, over any other possible inferences which might have been made in the absence of choosing to believe such evidence. However, the jury was not permitted to make that choice when the evidence was withdrawn from its consideration.

THE ISSUES RAISED BY THE PETITION FOR CERTIORARI WERE ON POINTS OF DECISION BY THE COURT OF APPEALS

Respondent, knowing this Court's reluctance to weigh evidence, has sought to make it appear that "solely an analysis of the evidence" was involved below. There is no gainsaying that the Court of Appeals did seriously disparage the petitioner's evidence (even though in so doing it invaded the jury's province). However, that court made it plain it was not basing its decision on its poor opinion on the evidence, but on the legal questions raised in the Petition for Certiorari.

Petitioner's Question 1 was Raised by the Opinion Below.

With respect to the withdrawal of the "inventory shortage" evidence which petitioner claimed should have been admitted to corroborate the direct evidence of theft, the Court of Appeals said (references are to pages of Appendix B to the Petition for Certiorari, where its opinion is set out in full) at page 39:

> If the district Court's instruction, in this regard, was error, it certainly was not plain error, and *appel-*

lant was obliged, in order to save the question for review, to except or object to it, in order to call the court's attention to any misstatement or oversight and to give an opportunity for correction." (Italics added.)

and again at page 40:

"Appellant further submits that the district court at the outset of the trial, specifically stated that 'exceptions are not necessary'; thus seeking to justify any failure to except to the charge to the jury. The court's ruling, however, that exceptions were not necessary, was made with regard to exceptions during the progress of the trial. Formerly counsel was obliged not only to object to such matters as rulings of the court on the admissability, or nonadmissibility of evidence, but it was also required to except ~~to~~ the rulings of the court during the trial, in order to save the question for review. *Such requirement has been discontinued. Rule 46 of the Federal Rules of Civil Procedure. However, it is still necessary to object or except to instructions of the court to the jury. Rule 51 of the Federal Rules of Civil Procedure.* Thus, it is seen that the remark of the court, that no exceptions were necessary, related to rulings during the trial, and *had no application to the requirement that a party must except or object to the court's instruction to the jury in order to save the question for review.*" (Italics added.)

and finally at page 43:

"The claimed inventory shortages would seem to be equally valueless to corroborate proof of thefts by individual employees. *But in view of what has heretofore been said, we are not obliged to pass upon this latter point.*" (Italics added.)

These excerpts plainly show that the Court of Appeals was basing its negative answer to Petitioner's Question 1, not on its poor opinion of petitioner's evidence but on

its holding that different standards apply to Rule 51 from those applied to Rule 46. The Court of Appeals completely ignored that under the provisions of Rule 46 itself, exceptions are not necessary when and because the complaining party has already made its position clear to the trial court or has not had the opportunity to do so, and refused to apply the same principle to Rule 51.

Annotators So Construe the Opinion Below

Not only petitioner but the annotators to the Federal Rules likewise so understand the Court of Appeals decision. *28 USCA, Rules 17 to 51, 1957, Cumulative Annual Pocket Part*, note 9, page 346, under Rule 46; note 2, page 377, and note 11, page 393 under Rule 51. This makes a corrective decision by this Court all the more necessary.

Petitioner's Question 2 Was Squarely Raised by The Opinion Below

The portion of the Court of Appeals' opinion appearing at pages 38-39 of appendix B to the Petition for Certiorari blames the trial court's instructions before argument, removing "inventory shortage" evidence from the case, on a proposed special charge submitted by petitioner, and at pages 35-36 ruled that petitioner in argument to the jury acquiesced in the trial court's exclusion of loss from unidentified employees. It failed to recognize that that special charge was such a modification of one previously prepared, and that petitioner's argument to the jury was so tailored, in order that both should conform to the trial court's still earlier announcement of its rulings excluding such evidence and such issue, which were the rulings later repeated in its instruction before argument. (See pages

8-9, 15-16 Petition for Certiorari). The same applied to the excerpt from petitioner's argument to the jury quoted on page 6 of respondent's brief. Petitioner's plea that it had merely sought "to win a verdict if he could within the narrower borders of the case that the judge had laid down for him", as permitted by *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (CA 2, 1952), cert. den. 343 U.S. 966, 96 L. ed. 1363, 72 S. Ct. 1061, was unavailing in the Court of Appeals below. Thus the portions of the opinion of that court just referred to clearly raised Question 2 in the Petition for Certiorari, and Annotators to the Rules of Civil Procedure also so understand. *28 USCA, Rules 17 to 51, 1957 Cumulative Annual Pocket Part*, note 8, pp. 389-390, under Rule 51.

RESPONDENT'S QUESTION 2

As shown in paragraph 14, page 5 *infra*, there is no evidence in the record that Jackson ever made a written confession to anyone, and petitioner's counsel at no time refused to produce any written statement from anyone.

Detective Merica's interrogation of Jackson, in which Jackson admitted that he had been stealing from petitioner for five years, occurred the very morning that Harris was caught red-handed with a load of stolen meat on the trash truck, and after Harris had implicated Jackson as the head of the ring.[23] Jackson's admission that he had been stealing from the petitioner for five years, could have had reference only to the theft of meat products of the kind found in Harris' truck. That was the only subject of the interrogation. It would be ridiculous to suppose that Jackson's admission had reference to anything else. In conversation, one does not repeat everything that has been said before as a preface to each sentence

Jackson had been talking to Merica about the theft of meat products, so when he admitted he had been stealing from petitioner for five years, the only reasonable interpretation to be given to his statement was that he had been stealing such meat products.

Moreover, the trial court having excluded that testimony, respondent was not obligated to ask further questions on details of the thefts which would also be excluded, just to make a record. Once testimony of a certain type is excluded and the record made to show that exclusion, the aggrieved party is not obligated to pursue further details of that line of testimony with additional questions and proffers. *McCandless* v. *United States*, 298 U.S. 342, 347, 80 L. ed. 1205, 56 S. Ct. 764 (1936).

Obviously, if Jackson had been stealing from petitioner for five years, up to the time he was being questioned by Merica, that span would include the last two years of the five, which was the period involved in this case. (Unfortunately for petitioner it had only begun to keep sufficient detailed product disposition records at the beginning of the two year period involved in this case.)

The cases cited by respondent forbidding inference on inference and mere speculation have no application to the jury's right to interpret reasonably what a witness means by a statement and to draw reasonable inferences from such interpretation. Practically every statement by any witness in any case requires some interpretation as to its meaning by the jury before the latter can proceed to draw primary inferences, which is its duty in every case.

The opinion of the Court of Appeals (pages 45-46 of Appendix B to Petition for Certiorari) shows that that court did not accept respondent's argument on the admissability of Jackson's statement to Merica, but rather left unanswered Question 3 and ruled adversely to peti-

tioner on Question 4 in the Petition for Certiorari, all as set forth at pages 18 to 25 of the Petition.

CONCLUSION

Respondent's brief has left the first four questions argued in the Petition for Certiorari undisturbed and still urgently needing a decision by this Court to resolve conflict among the Circuits and to settle important questions of interpretation of Rules 46, 51 and 61 of the Rules of Civil Procedure and rules of evidence in the federal courts. Respondent's brief has, however, served to emphasize the failure of the Court of Appeals itself to answer, or to disturb the erroneous manner in which the trial court answered, Question 5 of the Petition for Certiorari, because of the manner in which the Court of Appeals answered Petitioner's Questions 1 and 2.

For the reasons stated in the Petition for Certiorari it is respectfully submitted that it should be allowed.

Respectfully submitted,

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